STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	Docket No. 01-AFC-22
	)	
Application for Certification for the San Joaquin Valley Energy Center	)	

APPLICANT'S OPPOSITION TO STAFF'S REQUEST TO REOPEN THE HEARING RECORD

November 26, 2003

Jeffery D. Harris
Greggory L. Wheatland

ELLISON, SCHNEIDER & HARRIS L.L.P.
2015 H Street
Sacramento, CA 95814
(916) 447-2166
(916) 447-3512 (fax)

Attorneys for
San Joaquin Valley Energy Center LLC

TABLE OF CONTENTS

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	Docket No. 01-AFC-22
	)	
Application for Certification for the San Joaquin Valley Energy Center	)	

APPLICANT'S OPPOSITION TO STAFF'S REQUEST TO REOPEN THE HEARING RECORD

INTRODUCTION AND SUMMARY

Pursuant to the Committee's direction via email on November 20, 2003, the San Joaquin Valley Energy Center, LLC ("SJVEC" or the "Applicant") hereby files the following Opposition to Staff's Request to Reopen the Hearing Record.

The Applicant offers multiple, alternative grounds for the Committee to reject Staff's request.[1] These reasons are set forth in Sections I-V below. First, reopening the hearing record will result in additional delay and thus substantial prejudice to the Applicant. The record in the SJVEC case has been closed for nine (9) months, and it is certain that more than two years will have lapsed between the project being Data Adequate and the Commission's final approval in early 2004. Reopening the record will further delay a case that has lingered without a decision for far too long.

[1] This request has not been made in a properly captioned formal motion, as authorized by Section 1716.5 of the Commission's rules. Instead, the request is made in passing in the final paragraph of a 2 page memo summarizing the revised analysis.

Second, the Staff has admittedly failed to demonstrate "good cause" for seeking to reopen the record more than nine months after the hearing record closed. Because the information Staff seeks to introduce is not relevant to any decision the Committee must make on the SJVEC application, the request to reopen the record should be denied.

Third, the Commission lacks "permit jurisdiction" over reconductoring activities. Accordingly, the possibility of future reconductoring cannot and should not delay the issuance of the Commission's certificate in this matter.

Fourth, even assuming, *arguendo*, that the Commission had an unspecified "CEQA" obligation related to reconductoring, reconductoring is not reasonably foreseeable at this time. It is mere speculation to suggest now what may be the relevant Congestion Management requirements and the then-existing state of the local grid at the time SJVEC becomes operational. Further, reconductoring is just one of many potential Congestion Management measures that would be considered in the future if, and only if, Congestion issues exist at the time SJVEC begins operations. Finally, the Commission's TSE Conditions of Certification more than fulfill the Commission's permit and "CEQA" obligations.

Fifth, reconductoring activities are exempt from CEQA pursuant to lawfully promulgated regulations. Accordingly, the Commission must recognize this CEQA exemption and not delay certifying the SJVEC project based on some unarticulated "CEQA" review which is clearly contrary to the CEQA exemption. The CPUC, the state agency with jurisdiction over intrastate transmission facilities, has memorialized this CEQA exemption in its regulations. Again, the Commission cannot delay the SJVEC project on "CEQA" grounds, given this clear categorical exemption in the CPUC's regulations.

Accordingly, for the reasons discussed herein, the Committee should deny the Staff's request to reopen the hearing record in this proceeding. Any one of these five alternative grounds is a sound basis for denying the request. Cumulatively, all five reasons offer a compelling basis for immediate, summary denial of the Staff's request.

I. Reopening the Hearing Record Will Result in Further Delay and Substantial Prejudice to the Applicant.

The Staff's request to reopen the hearing record further exacerbates the continuing prejudice to the Applicant from substantial procedural delay. Specifically, the reopening of the hearing record will result in further delay of a project which has already suffered from extensive delays.

In considering the prejudice to the Applicant, the following dates are relevant.

- It has been more than nine (9) months since the hearing record closed on February 21, 2003.
- It has been more than two years (25 months) since the AFC was filed on October 31, 2001, and nearly two years since the application was deemed Data Adequate on January 9, 2002.
- The Commission determined that the SJVEC qualified for the six-month siting review. (Ironically, Staff later opposed the conversion to a twelve-month process.)
- Even if the PMPD were to be issued the day after Staff's response to this Opposition on December 4, 2003, the Commission could not approve the SJVEC project until well after the second anniversary of the project being Data Adequate (mid-January 2004 at the earliest).
- Reopening the record will most certainly result in further delay beyond this already unacceptable project approval schedule. Even if the new evidentiary hearing is held

concurrently with the Committee hearing on the PMPD, this hearing could cause substantial delays to accommodate additional written testimony, rebuttal testimony, transcript preparation and supplemental briefs. Equity dictates that the Applicant should not suffer further delays.

The delay in approving the SJVEC project has already resulted in substantial cost and prejudice to the Applicant. Given that the information that the Staff seeks to introduce at this late stage is admittedly irrelevant to any decision the Commission must make in this proceeding as discussed below, the Committee should deny the request to reopen the hearing record.

II. The Staff Has Admittedly Failed to Demonstrate "Good Cause" For the Reopening of the Hearing Record.

The burden is on the Staff to demonstrate "good cause" for the introduction of the evidence it now seeks to interject at this late date in the proceeding.[2] Staff has failed to meet this burden because the Staff has failed to demonstrate good cause for reopening the hearing record.

On its face, the revised Appendix is admittedly irrelevant to any matters the Commission must decide in this proceeding.[3] Specifically, the Appendix concedes that the Commission has no permit jurisdiction and no CEQA authority over the issues addressed in the Appendix:

> *Reconductoring will be a separate project or projects, with a different applicant before a different agency, and will be subject to that agency's CEQA analysis.* (Staff Appendix A, p. 4-1.)

Given this admission that reconductoring would be a separate project by a different applicant before a different agency, the request to reopen the record in this proceeding must be rejected.

[2] 14 CCR 1712(a), 1716(e), and 1212(d).
[3] Public Resources Code Section 25523; 14 CCR 1755.

The information being revised is an "Appendix" to the Staff's testimony. It was originally filed as an Appendix precisely because it is not material to the issues the Commission must decide in this proceeding. No party sought live witness testimony on this issue. No party briefed this issue. The information could not have been more irrelevant to any decision that the Commission must make.

Staff admits that the "actual need for reconductoring will be finally determined after PG&E has completed the Final Design Study or Cost Study for the Generator Facility Interconnection Agreement for the SJVEC project." (Staff Appendix A, p. 4.) Yet in its cover letter, Staff suggests that the new information to be considered is in an April 2003 Facilities Study. The "Facilities Study" is neither a Final Design Study nor the Cost Study that Staff admits will determine the "actual need for reconductoring." Further, even assuming that an April 2003 Facilities Study is a pretext for the revision to the Appendix, Staff has not explained why it should take six months to submit this revision. Accordingly, Staff has also failed to show good cause for issuing this revision so late in the proceeding. Staff has had two years to review an Application which they themselves insisted be processed under a six-month schedule and the release of a Facilities Study is irrelevant to the issue as framed by the Staff. Staff has offered no reason or excuse for the untimely issuance of this revision.

By Staff's own admissions, there is no good cause for requiring an environmental analysis that is irrelevant to any decision the Commission must make on the SJVEC project. Given that the potential for reconductoring in the future is irrelevant to any decision the Committee must make on the SJVEC application, the Staff has failed to demonstrate good cause for the reopening of the record. Accordingly, the Staff's request must be denied.

III. The Commission Lacks "Permit Jurisdiction" Over The Reconductoring Of Transmission Facilities.

When the California Legislature created the California Energy Commission it granted to the CEC the exclusive power to certify certain power plants and certain transmission facilities. The statutes did not provide the CEC with authority to license all transmission facilities. Instead, the legislature expressly limited the types of transmission facilities that could be licensed by the CEC.

Public Resources Code Section 25107 defined the types of electric transmission lines to be licensed by the CEC as follows:

> "Electric transmission line" means any electric power line carrying electric power from a thermal power plant located within the state *to a point of junction* with any interconnected transmission system. "Electric transmission line" *does not include any replacement on the existing site of existing electric power lines with electric power lines equivalent to such existing electric power lines* or the placement of new or additional conductors, insulators, or accessories related to such electric power lines on supporting structures in existence on the effective date of this division or certified pursuant to this division." (Public Resources Code 25107; emphasis added.)

This statute placed two important limitations on the jurisdiction of the CEC over electric transmission facilities:

1) The jurisdiction of the Commission does not extend to electric transmission lines beyond the point of interconnection between the thermal power plant to the point of junction with the interconnected transmission system, and

2) The jurisdiction of the Commission expressly excludes the replacement on the existing site of existing electric power lines with electric power lines equivalent to such existing electric power lines or the placement of new or additional conductors on existing supporting structures.

Clearly, the Energy Commission does not have the authority to license, permit, condition or restrict the replacement or reconductoring of existing power lines, especially those beyond the

first point of interconnection with the transmission grid. The authority over existing electric transmission lines owned or operated by investor-owned utilities continues to reside with the California Public Utilities Commission. Similarly, "Congestion Management" (as opposed to safe and reliable interconnection) is a largely federal concern that is most certainly beyond the scope of the Commission's state law authorities.

Jurisdiction over reconductoring activities and the accompanying environmental review of reconductoring activities rests with other agencies. To the extent transmission issues relate to intrastate issues, the CPUC has state law jurisdiction and the accompanying CEQA responsibilities. To the extent transmission issues relate to Congestion Management, those federal issues are beyond the Commission's jurisdiction. Accordingly, Staff's request to reopen the record must be rejected.

IV. Reconductoring Is Not Reasonably Foreseeable Under CEQA.

As discussed immediately above, the Commission currently lacks permit jurisdiction over reconductoring. As discussed below, from a CEQA perspective, reconductoring work is categorically exempt. Nevertheless, assuming, *arguendo*, that these legal authorities did not exist, the possibility of reconductoring is not "reasonably foreseeable" under CEQA.

CEQA requires that potentially significant effects of a project must be reasonably foreseeable.[4] The Staff admits that the opinions expressed in the Appendix are mere ***speculation***, a "presumption" at best. In fact, the Staff in great detail has described the process another agency will follow for this separate CEQA project, should reconductoring be required:

> The ***actual need for reconductoring*** will be finally determined after PG&E has completed the Final Design Study or Cost Study

[4] Public Resources Code 21065**;** 14 CCR 15378.

> for the Generator Facility Interconnection Agreement for the SJVEC project, and reaches agreement with SJVEC owner concerning funding of the needed reconductoring. At that time, ***presuming reconductoring is actually needed***, PG&E would apply to the California Public Utilities Commission (CPUC) for authority to implement the reconductoring project, and to recover the cost of the reconductoring from Calpine and/or PG&E ratepayers. (Staff Appendix A, p. 4-1; emphasis added.)

Staff admits (1) that it can only 'presume" that reconductoring may occur if certain events unfold and certain other Congestion Management tools are not employed and (2) that it is the CPUC, not the CEC, that must consider the issues related to reconductoring if, and only if, a reconductoring project is proposed in the future.

Even assuming that the Commission had CEQA obligations related to reconductoring, such reconductoring is not reasonably foreseeable at this time. In simplest terms, any reconductoring activities will be related to Congestion Management – not safe and reliable interconnection. No one today can reasonably foresee what the future holds regarding Congestion Management. Some important variables include:

- The Standard Market Redesign and final, federally-approved Congestion Management scheme for new and existing generation.
- The state of the local grid at the time of interconnection; that is, the transmission studies are all based on assumption as to projected load, projected generation, and projected projects that may or may not actually be built when this project seeks final interconnection authority. The menu of Congestion Management tools available – of which reconductoring is only one such tool – will depend on, among other things, the then-existing load, generation, transmission system configuration, transmission system changes, and the legally-enforceable Congestion Management protocols.

It is simply not reasonably foreseeable what will be the state of affairs for Congestion Management policy, in general, and the conditions in the local grid, in particular.

In the face of this ambiguity, the Commission has not ignored these issues. Instead, the TSE Conditions of Certification, in general, and TSE-1, in particular, recognize that the world will change and requires that the Applicant inform the Commission of its decisions in the future. Thus, through the TSE Conditions of Certification, the Commission has more than fulfilled its responsibilities under the law.

Accordingly, even assuming *arguendo* that the Commission has some CEQA obligations related to reconductoring, the Committee should find that reconductoring is not reasonably foreseeable at this time.

V. The Commission Lacks "CEQA" Jurisdiction To Review Reconductoring Of Transmission Facilities Because Such Activities Are Categorically Exempt.

It has been suggested that the CEC's review of a thermal power plant application is required by CEQA to include consideration of reconductoring activities that are reasonably foreseeable if the CEC approves the project. While it is true, as a general proposition, that the agency must consider all phases of the entire project, and not merely the particular approval at issue, there is an important exception to this general rule: An agency is not required to include in its environmental document any activity which has been determined not to have a significant effect on the environment and which is therefore categorically exempt from the provisions of CEQA.

Reconductoring of existing electric transmission lines on existing poles within existing rights-of-way is an activity that has been determined not to have a significant effect on the

environment. That determination of no effect is memorialized in the CEQA exemption applicable to reconductoring activities.

Specifically, Section 21084 of the Public Resources Code requires the Secretary of Resources to include in the CEQA guidelines a list of projects that have been determined not to have a significant effect on the environment. In response to this mandate, the Secretary promulgated Title 14 of the California Code of Regulations, Chapter 3, Article 19, titled "Categorical Exemptions." (14 CCR 15300-15332.) "Class 2" of these lawfully promulgated categorical exemptions includes the following exemption for reconductoring activities:

> "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to: …
>
> (c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity." (14 CCR 15302.)

As a matter of law, when a project or activity is categorically exempt, a public agency is prohibited from requiring an EIR for the activity, except under certain limited circumstances that are inapplicable here.[5] Ignoring the categorical exemption by requiring additional "CEQA" analysis would completely eviscerate the purpose of categorical exemptions in clear violation of the basic canon of statutory construction. The introduction to the CEQA categorical exemptions sets forth unambiguously the broad scope of the exemption granted for activities such as reconductoring:

> Section 21084 of the Public Resources Code requires these Guidelines to include a list of classes of projects which have been

[5] Section 15300.2(c) provides that "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." An activity that is consistent with the surrounding, existing land use does not involve an "unusual circumstance" within the meaning of this exception. *Bloom v. McGurk*, (1st Dist 1994) 26 Cal.App.4th 1307, 1315-16.

> determined not to have a significant effect on the environment and which shall, therefore, be ***exempt*** from the provisions of CEQA. (14 CCR 15300.)

Accordingly, even assuming that the Commission had "CEQA" jurisdiction over reconductoring and that such reconductoring was reasonably foreseeable, reconductoring activities are categorically exempt.

The CEQA categorical exemption for reconductoring activities is further embodied in the CPUC's own regulations. The CEQA guidelines require that each public agency shall list those specific activities that fall within the exempt classes. Pursuant to this direction, the California Public Utilities Commission, which is the public agency with licensing jurisdiction over electric transmission lines beyond the first point of interconnection with newly licensed thermal power plants, has listed those specific activities which fall within the exempt classes:

> Class 2 Exemptions.
> The replacement or reconstruction, including reconductoring of existing utility structures and facilities where the new structure or facility will be located on the same site as the replaced structure or facility and will have substantially the same purpose and capacity as the structure replaced. CPUC Rule 17.1.h.ii6

The CPUC regulations concerning reconductoring recognize the CEQA categorical exemption, and there is no authority to ignore the exemption.

The Commission must recognize that reconductoring activities are categorically exempt. Thus, the information presented in the Staff Appendix is irrelevant to any decision the Commission must make on the SJVEC application.

[6] Not only has the CPUC found reconductoring to be categorically exempt, the CPUC has also expressly provided that regulated Public Utilities do not have to obtain a permit to construct or provide public notice to affected property owners for placing new or additional conductors, insulators, or their accessories on supporting structures already built, for the minor relocation of existing power line facilities up to 2,000 feet in length, or for the intersetting of additional support structures between existing support structures. General Order 131-D. Section II.B.1

CONCLUSION

For the reasons set forth above, the Commission should deny the Staff's request to reopen the hearing record in this proceeding.

Respectfully submitted,

Dated: November 26, 2003

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

Jeffery D. Harris
Greggory L. Wheatland
Attorneys for
San Joaquin Valley Energy Center LLC

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-22
Application for Certification for	)	
the San Joaquin Valley Energy Center	)	
	)	

PROOF OF SERVICE

I, Ron O'Connor, declare that on November 26, 2003, I deposited copies of the attached *Applicant's Opposition to Staff's Request to Reopen the Hearing Record* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

Ron O'Connor

SERVICE LIST
01-AFC-22

John L. Carrier, J.D.
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833-2943

Tom Lagerquist, Principal
Peregrine Environmental
1000 River Rock Drive, Suite 117
Folsom, CA 95630

Mike Argentine
Manager, Project Development
Calpine Western Region Office
4160 Dublin Blvd.
Dublin, CA 94568

Shahid Hami
City Manager
City of San Joaquin
P.O. Box 758
San Joaquin, CA 93660

Seyed Sadredin
Director of Permit Services
San Joaquin Valley Unified APCD
1990 E. Gettysburg Avenue
Fresno, CA 93726-0244

Stan Ediger, Manager
Fresno County Planning Dept.
2220 Tulare Street
Fresno, CA 93721

California Unions for Reliable Energy
Adams Broadwell Joseph & Cardozo
c/o Marc D. Joseph, Esq.
651 Gateway Boulevard, Suite 900
South San Francisco, CA 94080

Keith and Barbara Freitas
4721 W. Jennifer, Suite 21
Fresno, CA 93722